TIPS FOR SETTLING YOUR CASE AT MEDIATION:

"Those that fail to learn from history are doomed to repeat it." Winston Churchill (1948).

Provided are proven tips that will help both plaintiff and defense counsel maximize the potential for settlement at mediation. Use it as a check-list for each mediation.

PRE-MEDIATION:

Be prepared: Know Your File.

Prepare your client for the mediation procedure.

Provide your client with the required *Mediation Disclosure Notification and Acknowledgement* form (Evidence Code § 1129) regarding confidentiality of the mediation process. Have this form signed by your client. The "safe-harbor" form language is provided under the "*FORMS*" caption of my website at www.shawmediations.com

Know the "market value" of your case. This is where the settlement number resides.

Manage your client's expectations. A settlement requires both sides to move off their "wish number" in order to make a deal. Motivate the client toward settlement. Failure to manage the expectations dooms the mediation to failure. Prepare your client to be flexible and able to move from their "dream number" to their "sweat number" at the appropriate time.

At the pre-mediation telephone call with the mediator, advise of any impediments to settlement; status of any prior settlement discussions; indications from the other side where their "number" could be driven; any potential client control problems; challenges with the opposing side;

and anything else that is not in your brief that would advance the probability of settlement.

For plaintiff's counsel make sure to personalize your client and distinguish him from the myriad of other claims that are on the adjuster's pending.

Provide all medical records and bills to the defense at least **30 days** before the mediation especially if there is future medical care/surgery/life care plan to be considered. The insurance carrier/risk manager/general counsel needs time to evaluate and "roundtable" the claim to set the reserve and authorize the settlement authority. The time to influence the reserve number is well before the mediation. Ask the defense counsel if she needs anything else in order to have meaningful settlement discussions. The mediation will fail if plaintiff's counsel "surprises" the defense team with new information that has not been previously considered.

Set the mediation for a date after the defense has had adequate time to evaluate the claim but before significant litigation costs have been incurred.

Control the litigation/expert costs prior to the mediation. Consider ways of exchanging expert information before the statutory date of disclosure if it will move the needle toward settlement.

Provide the mediator with all documents that support your position. Also provide any documents that are contrary to your position and how you are going to control the detrimental effect at trial.

In bodily injury cases provide a summary and timeline of the medical treatment and bills. Do not attach every medical record. Rather, provide the most important medical records and highlight that portion of the record that can be used as a "screen-shot" in the other room. Defense counsel should provide the IME report. Also include calculation of the

"*Howell*" number; loss of income documentation; lien amount(s); key excerpts from deposition testimony; social media research; and anything else that is important to persuade the other side of the strength of your client's case.

If the plaintiff is going to have future treatment or surgery provide a timeline of the future plan and cost itemization.

In motor vehicle accidents provide the *Traffic Collision Report*; photos of the post-impact damage to the vehicles; property damage estimates; witness statements; dashcam videos.

Consider sharing your brief. This is your opportunity to talk directly to the other side. Advocate those points that will persuade the other side of the strength of your case. Highlight your "homerun potential" if the stars align and the jury agrees with your best outcome. Use jury verdicts/settlements for similar cases as support. If you have "secret-stuff" that you don't want to disclose to the other side, prepare a separate brief for the "mediator's eyes only" marked "CONFIDENTIAL."

Make sure all decision makers will be participating in the mediation. For the plaintiff that includes non-party family members or support folks who have influence over the plaintiff be it a spouse or parent. The defendant/insured should participate if there are coverage issues, limited policy limits or punitive damages.

Advise the mediator if you are having client control problems. Set up a back channel to talk to the mediator outside the presence of your client either in a separate break-out room (Zoom) or telephone contact. Provide your cell number and text contact to the mediator.

Before the mediation make a reasonable opening demand/offer that anchors the range of the negotiations. Avoid making an outrageous demand that is not supported by the facts, law, or medicine. Doing so will get a hostile response from the defense counsel/adjuster who

controls the "checkbook." "If you hang the meat low enough the dog will jump," a retired Texas trial judge once famously drawled.

Do not raise the pre-mediation demand or lower the offer if nothing has changed. This will get a hostile response and could very well fail the mediation.

GENERAL MEDIATION STRATEGIES:

In cases of disputed liability, the plaintiff should be prepared to expect a discount factor on the potential economic threshold for settlement.

Don't draw a "line in the sand" and then undermine it with a lower demand/higher offer. It will compromise your credibility. If you threaten to "go to trial" then try the case. If not, avoid the ultimatum. You're most probably going to see the other side in the future and your credibility is essential.

Check the ego at the door. At the start of the mediation it is OK to flex your trial prowess and show that you are a Gladiator and will fight like hell at trial--but then get to work on settling the case. Trial prowess and settlement acumen are two disparate skills. We've all won trials and, if you've tried enough cases, lost trials. If you are so clairvoyant to predict with certainty how twelve random people off the street are going to decide your case, then you are better off picking six numbers in tonight's lottery and retiring to Bora Bora.

Have your experts' opinions regarding liability, causation, and/or damages readily available to support your demand/offer.

Pick your fights. Sometimes it is better to concede a point and focus on a stronger element of your client's case. Maintain your credibility.

Be kind and respectful to opposing counsel and her clients. There is wide discretion on both sides regarding where the case can be settled.

Goodwill often pays dividends in closing the deal. If you are a "jerk" the other side will respond accordingly.

Don't be too quick to agree to brackets. The other side will focus on the "midpoint" of the bracket as your "settlement number." But if the midpoint is your "settlement number" then the bracket may be a good tactic at the right time.

Do not let the mediator make a "mediator's proposal" without your permission to do so and make sure to get an indication as to the tight range of where the number would be contained before giving permission to make the proposal.

Don't continue to negotiate if there is no chance of settlement. Sometimes the best dispute resolution process is a jury verdict.

If the case settles at mediation, execute a *Stipulation for Settlement*, signed by both sides, with a CCP § 664.6 enforcement provision so there is no "buyer's remorse." Counsel's signature is now sufficient to bind a "party" pursuant to the recent amendment to CCP § 664.6. However, it may be prudent to have the client also sign the stipulation (CYA). In order to enforce the *Stipulation for Settlement*, you must be compliant with *Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913.

Better yet, defense counsel should have the release ready for signature by the plaintiff at the mediation once the settlement amount and the terms of settlement have been decided.

If the defense is going to require that the settlement amount be confidential as a condition of the settlement, raise it early in the negotiations. It is helpful to have a draft of the enforcement/liquidated damages language available for review by plaintiff's counsel to avoid future problems. Plaintiff's counsel should be aware of any potential income tax exposure to the plaintiff for the "confidentiality" term as

more fully discussed in the "*Dennis Rodman*" case. *Amos v. Commissioner*, 2003 Tax Ct. Memo LEXIS 330 (2003).

If there are any issues with the closing documentation get the mediator involved to help work them out.

If the case cannot be settled, consider a creative alternative dispute resolution process to avoid the expense of a jury trial. If a legal issue is hanging up the case, consider a legal-issue trial with a respected decision maker (appellate justice/former trial judge/learned counsel). If it is a technical issue dispute preventing settlement, retain an independent engineer to decide the issue. Consider a high-low binding arbitration in which counsel control the timing and presentation of expert evidence. If the carrier does not do "binding arbitrations," frame it as a "bench-trial tried before a retired superior court judge." Think outside the box.

LEARN ADVANCED NEGOTIATION SKILLS:

After 44 years of jury trial experience (both plaintiff and defendant verdicts) and countless MSCs/Mediations/VSCs/Arbitrations, I've seen just about every mistake that folks can make in mucking up their client's case. Don't add to this list of screwups. Learn from history. I've prepared a webinar on *Successful Mediation Tactics,* a version of which I presented to certain LASC judges and the Court panel mediators when I was on the LASC ADR Rules Committee. Please contact me if you're interested in improving your negotiation skills and success at mediation.

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